Supreme Court, U.S.
FILED

97-1886 MAY 22 1998

OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JEAN A. M. MEADE

Petitioner,

VERSUS

USAA LIFE INSURANCE COMPANY

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED FOR REVIEW

The court of appeal failed to adhere to the standard of review, established by this Court and by other courts of appeal, for determination of whether or not a contended issue material fact was sufficient to require a trial on the merits. It appears that the court of appeal failed to make that "independent review of the record" necessary to its determination that there was "no genuine issue as to any material fact" and that the "movant is entitled to judgment as a matter of law." Certainly, there was no evaluation of the facts in the light most favorable to the nonmovant.

The statement in the panel decision, that "The company denied coverage because Meade's former husband ceased paying premiums and allowed the policy to lapse more than one year before he died," was drawn from the decision of the district court and his statement that, "**There is no material factual dispute that the policy lapsed on May 14, 1994 for non-payment of premiums.**" A-19. However, the lapse notice itself, A-22, states that: "**This policy will lapse 06-14-94**."

The decision of the district court, who was arguably persuaded by a failure of USAA to correctly

characterize this and other factual issues,[1] was entitled to no deference. In addition, this circumstance, as found by the panel, "requires a detailed evidence-based review of the record" that would have uncovered the fact that the district court suffered from confusion as to the date of lapse, accepting May 14, 1994, the date of lapse as contended by USAA in its moving papers, rather than June 14, 1994, the actual date of lapse as stated by USAA on its own lapse notice. Had this been done, the panel decision could not have stated that "Louisiana law affords no support for her argument that the one-year policy extension provided by LSA-R.S. 22:177 . . . lasted beyond May 14, 1995, one year after her ex-husband's death," when John Meade's death was on June 6, 1995, less than one year after the June 14, 1994 date of lapse and was certainly not on May 14, 1994.

It appears that the court of appeal has deviated from this Court's procedure that requires an extensive and *de novo* of review of the summary judgment record, rather than, as here, in which fatal deference was given to the district court's flawed opinions and his incorrect factual findings.

---

[1] USAA's brief in the court of appeal was criticized, albeit unfairly, in a footnote to the panel decision, for this reason.

PARTIES TO THIS PROCEEDING

Petitioners/Plaintiff:

Jean A. M. McCurdy Meade

Counsel for Petitioners:

Louis R. Koerner, Jr.

Defendants/Respondents:

USAA Life Insurance Company

Counsel for Respondents:

Richard E. McCormack of Montgomery, Barnett, Brown, Reed, Hammond & Mintz, LLP

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TRIAL COURT:

Jean A.M. Meade versus USAA, (United Services Automobile Association), C.A. No. 96-1815 (United States District Court, Eastern District of Louisiana, February 6, 1997, 1997 U.S. Dist. LEXIS 1220, Written Reasons and Final Judgment). A6-15.

Jean A.M. Meade versus USAA, (United Services Automobile Association), C.A. No. 96-1815 (United States District Court, Eastern District of Louisiana, February 6, 1997, 1997 U.S. Dist. LEXIS 1220, Written Reasons and Final Judgment). A16-21.

APPELLATE COURT:

Meade v. USAA Life Insurance (Fifth Circuit, 97-30507, January 22, 1998) (Decision without Published Opinion at 136 F.3d 1328; 1998 U.S. App. LEXIS 2252) A2-3.

Meade v. USAA Life Insurance, Rehearing and Suggestion for Rehearing En Banc Denied February 23, 1998, Reported at: 1998 U.S. App. LEXIS 4731 A4-5.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on January 22, 1988 and denied the application for rehearing on February 23, 1998.

STATUTE INVOLVED

FRCP Rule 56, Summary Judgment

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

The original petition was filed against USAA (the United Services Automobile Association) in Louisiana state court and removed by USAA Life Insurance Company ("USAA"). USAA Life filed an answer contending, *inter alia*, that the policy of life insurance, No. 73814101, lapsed due to non-payment of premiums, effective May 14, 1994. Extensive discovery was undertaken.

Both plaintiff and defendant filed motions for summary judgment. By Order and Reasons dated February 6, 1997 (A6-15), the district court denied plaintiff's motion and granted the USAA's motion. A timely motion for reconsideration was filed on February 18, 1997 and denied on April 17, 1997 (A16-21).

On January 22, 1998, the Fifth Circuit rendered a summary calendar decision without Published Opinion (A2-3). Rehearing and Suggestion for Rehearing En Banc was denied on February 23, 1998 (A4-5).

STATEMENT OF NECESSARY FACTS

As correctly stated by the district court,

> Ms. Meade was married to and subsequently divorced from John Arthur Meade. The divorce

judgment was rendered in December, 1989. On March 15, 1991, John Meade was ordered to provide mortgage insurance on the home in which Ms. Meade and their children were residing. Until the mortgage insurance was procured, John Meade was ordered to assign her "his existing life insurance policies on his life and name her as beneficiary of such policies to the extent of the balance of the mortgage on the Jackson property [i.e., the home]." Plaintiff exhibit l A. [A7.]

In April, 1991, John Meade purchased a USAA Life term life insurance policy, naming Ms. Meade as the beneficiary, in an amount sufficient to cover the outstanding amount of the mortgage. In 1993, Ms. Meade became concerned that her former husband might not have paid the premium on the life insurance policy so she contacted USAA Life on May 14, 1993, the anniversary date of the issuance of the policy, to determine whether the premiums had been paid. The USAA Life service representative informed Ms. Meade that since she was not the owner of the policy, no information could be released to her about the policy. [A7-8.]

Mrs. Meade contacted John Meade, got his authorization so that she could pay the premiums in

the event of lapse of the policy, and communicated this to Roxanne Moore, a USAA Life Service Representative, who sent Mr. Meade a letter, which stated the following in pertinent part:

> We have been informed by the beneficiary Jean Meade, that you would agree to an authorization to release information to her on the above referenced policy.
>
> If you still agree that we are able to release policy information to her, but not make any policy changes please sign and return this letter . . . Attention' Roxanne Moore.
>
> Plaintiff Exhibit 8. Mr. Meade signed and faxed the document to Ms. Moore.[1]

The district court found that when, several weeks later, a USAA Life representative telephoned Mrs. Meade to advise her that the policy was in effect and that John Meade had signed the letter, "Ms Meade

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[1] There is a statement in the online documentation that Mrs. Meade was to receive confirmation at 1314 Jackson Avenue, her home, if the signed letter was received. The letter was never sent. Rather she received ambiguous verbal notice that concealed the fact that the letter prepared by USAA Life did not do what Ms. Moore had agreed to do. This is amplified in her deposition that she expected to receive a written copy

clearly believed that this meant she would be notified by USAA Life if the policy was lapsing." However, the letter in USAA's file, which was never received by Mrs. Meade, was an authorization to provide Ms. Meade with information if she inquired about the status of the policy. "After she received the call from the USAA Life representative in 1993 advising her that Mr. Meade signed the authorization, she did not inquire because she thought she would be notified by USAA Life of lapse without having to inquire." The district court also found that, "She did not see the letter of authorization to USAA Life signed by Mr. Meade until after his death."

Mr. Meade did not pay the premium due on May 14, 1994. The lapse notice, which was sent to Mr. Meade, but not to Mrs. Meade, stated that the policy would lapse on June 14, 1994.

> John Meade died suddenly in June of 1995 [June 6, 1995] and Ms. Meade called USAA Life to make her claim. She was advised that the policy had lapsed in May, 1994, due to non-payment of premiums. Ms. Meade was distraught because she thought she would be informed if the policy lapsed. The USAA Life representative told her that she was to be given information upon inquiry, but that USAA Life did not have any responsibility under their

policies or pursuant to the authorization to notify her in the event of lapse. [A-10.]

Despite the existence of the USAA lapse notice stating June 14, 1994 would be the lapse date and the provisions of Louisiana law, LSA-R.S. 22:170A, providing for the 31 day grace period with which the written USAA lapse notice complied, USAA consistently contended in the district court that the policy lapsed on May 14, 1994, the date on which the final premium was due and more than one year before the date of Mr. Meade's death, rather than on June 14, 1994, less then one year before the date of Mr. Meade's death. LSA-R.S. 22:177 provides for a one year non-forfeiture period in the absence of notice to persons entitled to such notice.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

Although there were numerous material issues of fact that require a jury trial, this application will confine itself to the consequences of the material factual issue, considered dispositive by the district court and in the panel decision, of whether the date of lapse was June 14, 1994, the date contained on the USAA lapse notice, or May 14, 1994, the date consistently contended by USAA and accepted by the district court and subsequently by the Fifth Circuit on

account of its erroneous application of the standard of review of this Court and of other courts of appeal.

The statement in the court of appeal opinion, that "The company denied coverage because Meade's former husband ceased paying premiums and allowed the policy to lapse more than one year before he died," was drawn from the decision of the district court and his statement that, "**There is no material factual dispute that the policy lapsed on May 14, 1994 for non-payment of premiums.**" A-20. However, the lapse notice itself, A-22, states that: "**This policy will lapse 06-14-94.**"

The decision of the district court, who was arguably persuaded by a failure of USAA to correctly characterize this and other factual issues,[2] was entitled to no deference. In addition, this circumstance "requires a detailed evidence-based review of the record" by the appellate panel or at least by the author of the decision that would have uncovered the fact that the district court suffered from confusion as to the date of lapse, accepting May 14, 1994, the date of lapse as contended by USAA in its moving papers, rather than June 14, 1994, the actual date of lapse as stated by USAA on its own lapse

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[2] USAA's brief in Fifth Circuit was criticized, albeit unfairly, in a footnote to the panel decision, for this reason.

notice. Had this careful review of the record been done, the court of appeal could not have stated that "Louisiana law affords no support for her argument that the one-year policy extension provided by LSA-R.S. 22:177 . . . lasted beyond May 14, 1995, one year after her ex-husband's death," when John Meade's death was on June 6, 1995, less than one year after the June 14, 1994 date of lapse and was certainly not on May 14, 1994.

Under the circumstances of this case, the consistent mischaracterization of the date of lapse by USAA in the district court and its failure to provide the correct date, the confusion of the district court in its incorrect statement of the date of lapse, and USAA's failure to mention this issue in its brief on appeal, the court of appeal failed to adhere to the standard of review, established by this Court and by other courts of appeal, for determination of whether or not the contended issue or issues of material fact were sufficient to require a trial on the merits. It appears that the panel failed to make that "independent review of the record" necessary to its determination that there was "no genuine issue as to any material fact" and that the "movant is entitled to judgment as a matter of law." Certainly, there was no evaluation of the facts in the light most favorable to the nonmovant.

ARGUMENT AND AUTHORITIES

A. The Applicable Louisiana Law

The issue of notice and lapse is governed in Louisiana by LSA-R.S. 22:177, which is quoted in full at A-23-25, and which provides that a life insurer may not, within one year "after default in payment of any premium, . . . declare forfeited or lapsed any policy issued . . . unless a written or printed notice" has been mailed stating the amount of the premium due "**to the person whose life is insured or the assignee of the policy** if notice of the assignment has been given to the insurer, at the last known post office address of such insured or assignee, . . ."

> No policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Any payment demanded by such notice and made within the time limit shall be taken to be full compliance with the requirements of the policy in respect to the time of such payment.

No such notice was mailed to Mrs. Meade. To the extent such notice was required to be mailed, her letter and premium check sent on June 22, 1995 was timely and prevented the lapse of the policy. *Vining v. State Farm Life Ins. Co.*, 409 So.2d 1306, 1308-1313 (La.App. 2 Cir. 1982), *writ denied*, 412 So.2d 1098 (La.1982).

B. The Standard for Summary Judgment Established by This Court

The district court improperly resolved the critical issue of fact. His authority was limited to determining whether there were issues to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). Resolution of choices between conflicting versions of the facts is a matter for the jury, not for the district court on summary judgment. See, *e.g.*, Fed.R.Civ.P. 56(e), 1963 Advisory Committee Note; *Agosto v. INS*, 436 U.S. 748, 756, 98 S.Ct. 2081, 2086, 56 L.Ed.2d 677 (1978). Moreover, the court of appeal, as was the obligation of the district court, must consider all facts and inferences drawn therefrom in the light most favorable to the nonmoving party, here Mrs. Meade. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986).

C. Conflict With Other Courts of Appeal

The jury is entitled to decide which interpretation of the facts is correct. *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 744-75 (C.A.3 (N.J.) 1996) (the district court may not choose a favored interpretation); *Cantrell v. U.S. Dept. of Army Corps of Engineers*, 89 F.3d 268, 274 (C.A.6 (Ky.) 1996) (identifying the legal issue and then deciding if

resolution by the jury of a factual dispute could mean that the plaintiff could prevail); *Podolsky v. Alma Energy Corporation* , 1998 U.S. App. LEXIS 8807 * 17 (7th Cir. No. 97-2533, No. 97-May 5, 1998) (impermissible factfinding); *Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1998)

> The nonmovant is generally "given wide berth to prove a factual controversy exists." *Ulissey v. Shvartsman*, 61 F.3d 805, 808 (10th Cir. 1995). "The relevant inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Bingaman v. Kansas City Power & Light Co.*, 1 F.3d 976, 980 (10th Cir. 1993) (quotation omitted).

Had such a careful review of the record been properly undertaken, it would have demonstrated that plaintiff had revealed at least "a conflict in substantial evidence on the ultimate issue" of the date of lapse sufficient to withstand the motion for summary judgment. The actual lapse notice is certainly "substantial evidence," and "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. " *Thomas v. Dillard Department Stores, Inc.*, 116 F.3d 1432, 1433 (11th Cir. 1997)

The panel should have begun its determination by consulting the applicable substantive law to determine what facts and issues were material, then reviewed the evidence relating to those issues, viewing the facts and inferences in the light most favorable to the non-movant. If, as should have been done here, this careful review reveals that Mrs. Meade, the non-movant, had set forth specific facts in support of allegations essential to her claim, a genuine issue was presented, and the improperly summary judgment would have been reversed.

D. Excessive Reliance on the District Court

The lack of proper guidance to the district court by USAA suggests the situation in *Johnson v. Jones*, 515 U.S. 304, 316-18, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) in which this Court discussed the comparative lack of expertise of the courts of appeal as compared to the district courts in determining "the existence, or nonexistence of a triable issue of fact."

According to this Court:

> This problem is more serious, but not serious enough to lead us to a different conclusion. When faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed

> when it denied summary judgment for that (purely legal) reason. Knowing that this is "extremely helpful to a reviewing court," *Anderson*, 477 U.S. at 250, n. 6, district courts presumably will often state those facts. But, if they do not, we concede that a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.

Johnson, 515 U.S. at 319, 115 S.Ct. at 2159. The situation in this case is the perhaps exceptional one that "occasionally requires a detailed evidence-based review of the record . . ." that was apparently not undertaken by the panel or is not apparent in its decision.

On account of the failure of USAA to address the date of lapse as stated on its own lapse notice either in the district court or in its brief to this Court, the panel decision was in error in relying on the decision of the district court, in its conclusion that "Fortunately, the district court exhibited no such confusion," and in not undertaking the more thorough review of the record required in order to determine whether or not there was a dispute as to this essential issue in this case. The factual mistakes in the decision strongly support the conclusion that a less-than-adequate review of the record was made.

Although this Court in its decision in *Oubre v. Entergy Operations, Inc.*, ___ U.S. ___, 118 S.Ct. 838, 139 L. Ed. 2d 849 (1998) does not mention the lack of factual or legal analysis in the per curiam of this Fifthy Circuit in the decision reversed, *Oubre v. Entergy Operations, Inc.*, 112 F.3d 787 (5th Cir. 1996), it is certainly implicit in the majority opinion which reversed the summary judgment for the employer and engaged in a detailed discussion of the applicable law.

CONCLUSION

The standard of review of summary judgments of this Court and of the other courts of appeal places a considerable burden on the moving party and on the district court in granting summary judgment and alternatively on the court of appeal in reviewing the granting of summary judgment. The court of appeal must isolate the legal issues and then determine the facts to see if they are undisputed. Although the court of appeal opinion may have correctly "begun its determination by consulting the applicable substantive law to determine what facts and issues were material,"[3] it did not then review "the evidence relating to those issues, viewing the facts and inferences in the light most favorable to the non-

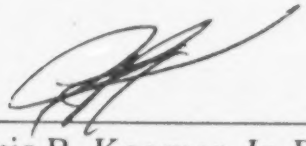
[3] This is not apparent from its brief decision.

movant" because it simply accepted the contentions of USAA, the moving party, as adopted by the district court, as to the date of lapse, without that necessary careful review of the summary judgment record and of the actual lapse notice itself. The USAA lapse notice, contained in the summary judgment record and A-22 herein, contradicts the factual conclusion of the district court and provided the key undisputed fact needed to justify partial summary judgment in favor of plaintiff and denial of USAA's counter-motion.

Despite the large number of vacancies in the circuit courts, the type of shortcut procedure apparently engaged in by this court of appeal is contrary to the established, although sometime difficult and time-consuming, standard of policy of this Court that prevents the "eroding [of] the quality of justice that traditionally has been associated with the federal judiciary."

Acceptance of review of this case will help to ensure that this standard continues undiminished.

LAW OFFICES OF LOUIS R. KOERNER, JR.

By: 

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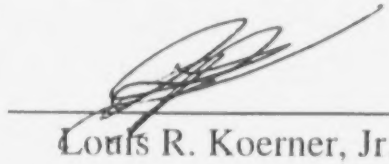
CERTIFICATE

Undersigned counsel of record certifies that a copy of the foregoing application for writ of certiorari has been sent to the following counsel on this 20th day of May, 1998 by first class mail, properly addressed, to USAA Life Insurance Company through its attorney, Richard E. McCormack, Montgomery, Barnett, Brown, Reed, Hammond & Mintz, LLP, 3200 Energy Centre, 1100 Poydras Street, New Orleans, LA 70163-3200.



Louis R. Koerner, Jr.

APPENDIX

CONTENTS TO APPENDIX

1. *Meade v. USAA Life Insurance* (Fifth Circuit, 97-30507, January 22, 1998) (Decision without Published Opinion at 136 F.3d 1328; 1998 U.S. App. LEXIS 2252) A2-3.

2. *Meade v. USAA Life Insurance,* Rehearing and Suggestion for Rehearing En Banc Denied February 23, 1998, Reported at: 1998 U.S. App. LEXIS 4731 A4-5.

3. *Jean A.M. Meade versus USAA, (United Services Automobile Association)*, C.A. No. 96-1815 (United States District Court, Eastern District of Louisiana, February 6, 1997, 1997 U.S. Dist. LEXIS 1220, Written Reasons and Final Judgment). A6-15.

4. *Jean A.M. Meade versus USAA, (United Services Automobile Association)*, C.A. No. 96-1815 (United States District Court, Eastern District of Louisiana, February 6, 1997, 1997 U.S. Dist. LEXIS 1220, Written Reasons and Final Judgment). A16-21.

5. Lapse Notice (A-22)

6. LSA-R.S. 22:170 (A-23)

7. LSA-R.S. 22:177 (A-23-25)

Meade v. USAA Life Insurance
97-30507
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
136 F.3d 1328; 1998 U.S. App. LEXIS 2252

January 22, 1998, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

SUBSEQUENT HISTORY: Rehearing and Suggestion for Rehearing En Banc Denied February 23, 1998, Reported at: *1998 U.S. App. LEXIS 4731.*

PRIOR HISTORY: United States District Court for the Eastern District of Louisiana. 96-CV-1815.

Before JONES, SMITH, and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff, Jean A.M. Meade, appeals the district court's summary judgment denying her claim for benefits from a life insurance policy issued by USAA

* Pursuant to 5TH Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH Cir. R. 47.5.4.

Life Insurance Company and covering the life of her deceased ex-husband. The company denied coverage because Meade's former husband ceased paying premiums and allowed the policy to lapse more than one year before he died; USAA asserted that it had no contractual or legal duty to notify Meade of the lapse. Meade argues that there are genuine issues of material fact which would preclude the grant of summary judgment.

We have carefully reviewed the briefs and the record, and we find no reversible error. Accordingly, we affirm for essentially the reasons relied upon by the district court. *See Meade v. USAA Life Ins. Co., No. 96-CV-1815* (E.D. La. Feb. 6, 1997). In particular, Meade is not entitled to coverage because Louisiana law affords no support for her argument that the one-year policy extension provided by LSA-R.S. 22:177 either did not apply to her or lasted beyond May 14, 1995, one year after her ex-husband's death.[1]

AFFIRMED

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[1] USAA's brief on appeal was of limited help insofar as it implied there was "no evidence" on some issues when, in fact, there was disputed evidence but the issues were not material to the parties' dispute. Fortunately, the district court exhibited no such confusion. USAA should more carefully follow the standards for appellate review of summary judgments.

JEAN A MEADE, Plaintiff - Appellant

v. USAA LIFE INSURANCE COMPANY, Defendant - Appellee

No. 97-30507

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

1998 U.S. App. LEXIS 4731

February 23, 1998, Filed

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans.

Original Opinion of January 22, 1998, Reported at: *1998 U.S. App. LEXIS 2252.*

JUDGES: Before JONES, SMITH and STEWART, Circuit Judges.

OPINION: ON SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor

judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Edith H. Jones
United States Circuit Judge

JEAN A.M. MEADE versus USAA (United Services Automobile Association)
CIVIL ACTION NO. 96-1815 SECTION: E/5

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
1997 U.S. Dist. LEXIS 1220

February 6, 1997, FILED, ENTERED

DISPOSITION: [*1] Motion of plaintiff Jean A. M. Meade for partial summary judgment DENIED; cross-motion of USAA Life for summary judgment, improperly styled a motion for partial summary judgment, GRANTED.

COUNSEL: For JEAN A MEADE, plaintiff: Louis Roy Koerner, Jr., Louis R. Koerner, Jr., Attorney at Law, New Orleans, LA. Kenneth William Jacques, Kenneth W. Jacques, Attorney at Law, New Orleans, LA.

For USAA LIFE INSURANCE COMPANY, (incorrectly identified as USAA (United Service Automobile Association), defendant: Richard Edward McCormack, Montgomery, Barnett, Brown, Read, Hammond & Mintz, New Orleans, LA.

OPINION BY: MARCEL LIVAUDAIS, JR.
OPINION: ORDER AND REASONS

Plaintiff Jean McCurdy Meade ("Ms. Meade") has filed a motion for partial summary judgment. Defendant USAA Life Insurance Company ("USAA Life") has filed a cross motion for summary judgment. For all practical purposes, the Court finds that there are no material issues of fact in dispute.

Ms. Meade was married to and subsequently divorced from John Arthur Meade. The divorce judgment was rendered in December, 1989. On March 15, 1991, John Meade was ordered to provide mortgage insurance [*2] on the home in which Ms. Meade and their children were residing. Until the mortgage insurance was procured, John Meade was ordered to assign her "his existing life insurance policies on his life and name her as beneficiary of such policies to the extent of the balance of the mortgage on the Jackson property [i.e., the home]." Plaintiff exhibit 1 A.

In April, 1991, John Meade purchased a USAA Life term life insurance policy, naming Ms. Meade as the beneficiary, in an amount sufficient to cover the outstanding amount of the mortgage. In 1993, Ms. Meade became concerned that her former husband might not have paid the premium on the life insurance policy, so she contacted USAA Life on May 14, 1993, the anniversary date of the issuance of the policy, to determine whether the premiums had been

paid. The USAA Life service representative informed Ms. Meade that since she was not the owner of the policy, no information could be released to her about the policy.

It was the policy and procedure of USAA Life that if the divorce or property judgment did not specify that the insurance policy in question was a USAA Life policy, no information would be released to the beneficiary. Ms. Meade contacted [*3] John Meade and told him that USAA Life would ask for his authorization so that she could be given information about the policy. He agreed to give authority to USAA Life to communicate Ms. Meade about the policy.

On June 29, 1993, Roxanne Moore, a USAA Life Service Representative, sent Mr. Meade a letter, which stated the following in pertinent part:

> We have been informed by the beneficiary Jean Meade, that you would agree to an authorization to release information to her on the above referenced policy.
>
> If you still agree that we are able to release policy information to her, but not make any policy changes please sign and return this letter . . . Attention' Roxanne Moore.

Plaintiff Exhibit 8. Mr. Meade signed and faxed the document to Ms. Moore.

Several weeks later, a USAA Life representative telephone [*sic*] Ms. Meade to advise her that the policy was in effect and that John Meade had given his permission for USAA Life to keep her informed about the status of the policy. Ms. Meade clearly believed that this meant she would be notified by USAA Life if the policy was lapsing. USAA Life's procedure was to notify either the owner, the irrevocable beneficiary, or the assignee [*4] of a life insurance policy when the policy was lapsing. Ms. Meade was a beneficiary, but not an irrevocable beneficiary, and she was neither the owner or the assignee. The letter in their file was an authorization to provide Ms. Meade with information if she inquired about the status of the policy. After she received the call from the USAA Life representative in 1993 advising her that Mr. Meade signed the authorization, she did not inquire because she thought she would be notified by USAA Life of lapse without having to inquire. She did not see the letter of authorization to USAA Life signed by Mr. Meade until after his death.

At no time after the authorization letter was sent and before his death did Ms. Meade request to see a copy of the authorization letter or inquire whether the policy was in effect or lapsing. In May 14, 1994, the

policy lapsed for non-payment of premiums. USAA Life sent letters to John Meade in June, 1994 and in July, 1994, notifying him that the policy had lapsed. Plaintiff Exhibits 7 and 8.

John Meade died suddenly in June of 1995 and Ms. Meade called USAA Life to make her claim. She was advised that the policy had lapsed in May, 1994, due to non-payment [*5] of premiums. Ms. Meade was distraught because she thought she would be informed if the policy lapsed. The USAA Life representative told her that she was to be given information upon inquiry, but that USAA Life did not have any responsibility under their policies or pursuant to the authorization to notify her in the event of lapse.

Ms. Meade then sent USAA Life a check for one and one-quarter years premium and her claim for the $180,000.00 value of the policy. USAA Life returned her check and denied the claim.

John Meade had an automobile insurance policy with USAA, United Services Automobile Association, a separate entity from USAA Life. After his death, USAA sent Ms. Meade a check in the amount of $3,441.25, from his "Subscriber's Savings Account," which is an account maintained by USAA, not USAA Life, containing USAA funds which would be sent to a subscriber's estate upon his death.

It was not available to USAA Life to pay premiums to USAA Life, nor did it represent cash value, dividends, or surplus of USAA Life.

Plaintiff Jean Meade argues that she was entitled to notice of lapse of the policy, in the absence of which the lapse is ineffective. She states that the authorization [*6] signed by John Meade constituted a written change in the terms of the policy, and that the USAA service representative verbally misrepresented that she would be given notification of lapse. She also claims that USAA Life could have applied the funds in the account maintained by USAA to pay the premiums. USAA Life opposes the plaintiff's motion for partial summary judgment, contending that it is entitled to summary judgment because it has complied with the requirements of LSA-R.S. 22:177, that plaintiff was not entitled to notice of lapse, and that plaintiff has no right to any benefit under the policy.

Louisiana Revised Statute 22:177 contains the requirement that a life insurer send written notice before a life insurance policy is terminated for non-payment of premiums. It provides, in relevant part:

> No life insurer shall within one year after default in payment of any premium, installment, loan or interest, declare forfeited or lapsed any policy issued or renewed, and not issued upon

the payment of monthly or weekly premiums or for a term of one year or less, for non-payment when due of any premium, installment, loan or interest, or any portion thereof required by the terms [*7] of the policy to be paid, unless a written or printed notice stating:

(1) The amount of such premium, installment, loan or interest, or portion thereof due on such policy; and

(2) The place where it shall be paid and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured or the assignee of the policy of notice of the assignment has been given to the insurer, at the last known post office address of such insured or assignee, postage prepaid by the insurer or any person appointed by it to collect such payment, at least fifteen and not more than forty-five days prior to the date when the same is payable.

No policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Any payment demanded by such notice and made within the time limit shall be taken to be full compliance with the requirements of the policy in respect to the time of such payment.

LSA-R.S. 22:177.

The policy requires that notice of lapse be sent to sent to "the person whose life is insured or the assignee of the policy." Ms. Meade was neither. There is no dispute that USAA [*8] life complied with the statute and the terms of the policy and the law by sending Mr. Meade a notice. Mr. Meade did not pay the premiums, so the policy was terminated.

Ms. Meade argues that the verbal agreement of the company and/or the authorization sent by Mr. Meade to USAA Life constituted a change in the policy. The authorization on its face states that the written terms of the policy are not changed, but that USAA Life may release information to Ms. Meade. Even accepting as true Ms. Meade's statement that she was told by USAA Life that she would be informed if the policy lapsed, the statement of a service representative cannot modify the written terms of the policy. The policy itself states that only a company officer can waive or change a provision of the policy, and then only in writing. Exhibit B of Exhibit 1, p. 5.

Even if no notice, or improper notice, had been sent, the policy extension provided by LSA-R.S. 22:177 would have been one year from the May 14, 1994 termination. See, *First American Bank & Trust of Louisiana v. Texas Life Insurance Company, 10 F.3d 332 (5th Cir. 1994)* (Court held that failure to

give written notice required in LSA-R.S. 22:177 creates [*9] a one-year extension, not a self-perpetuating extension that renews each year after the initial termination date of the policy). Thus, in no event would the policy have been in effect after May 14, 1995. Mr. Meade died after that date.

Finally, plaintiff claims that USAA Life should have taken the funds from the USAA Subscriber Savings Account, held in conjunction with his automobile policy, and applied it to the premiums due on his USAA Life insurance policy. There is no requirement in either policy that USAA Life apply the premiums in this way. Indeed, USAA and USAA Life are separate companies, although USAA Life is a wholly-owned subsidiary of USAA, and plaintiff has shown no authority in either life or automobile policies which would have allowed, much less required, that this be done.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of plaintiff Jean A. M. Meade for partial summary judgment be and is hereby DENIED;

IT IS FURTHER ORDERED that the cross-motion of USAA Life for summary judgment, improperly styled a motion for partial summary judgment, be and is hereby GRANTED.

New Orleans, Louisiana, this 6 day of February, [*10] 1997.

MARCEL LIVAUDAIS, JR.
United States District Judge

JUDGMENT

Considering the record, the Order and Reasons entered this date, and the law, for the reasons assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of defendant USAA Life Insurance Company, and against plaintiff Jean A. M. Meade, DISMISSING plaintiff's complaint, with costs.

New Orleans, Louisiana, this 6 day of February, 1997.

MARCEL LIVAUDAIS, JR.
United States District Judge

JEAN A. M. MEADE versus USAA (United States Automobile Association)
CIVIL ACTION NO. 96-1815 SECTION: E/5

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
1997 U.S. Dist. LEXIS 5663

April 17, 1997, FILED; April 18, 1997, Entered

DISPOSITION: [*1] Motion of plaintiff for reconsideration DENIED.

COUNSEL: For JEAN A MEADE, plaintiff: Louis Roy Koerner, Jr., Louis R. Koerner, Jr., Attorney at Law, New Orleans, LA. Kenneth William Jacques, Kenneth W. Jacques, Attorney at Law, New Orleans, LA.

For USAA LIFE INSURANCE COMPANY, (incorrectly identified as USAA (United Service Automobile Association), defendant: Richard Edward McCormack, Montgomery, Barnett, Brown, Read, Hammond & Mintz, New Orleans, LA.

OPINION: RULING ON MOTION

Plaintiff Jean A.M. Meade has filed a motion for reconsideration of the order granting defendant USAA Life's motion for summary judgment and

denying plaintiff's cross-motion for summary judgment. Defendant USAA Life opposes the motion.

Meade filed suit against USAA Life alleging that she was entitled to notice of lapse of the policy issued on the life of her former husband, John Meade. John Meade was the owner and the insured on a USAA life insurance policy, and Mrs. Meade was the beneficiary. The policy was originally purchased by Mr. Meade in order to ensure that the balance of the mortgage on the home in which the plaintiff [*2] was residing was paid. Mr. Meade did give the insurer permission to answer any questions Mrs. Meade might have concerning whether the premiums had been paid. Mrs. Meade contends, however, that the insurer was required to notify her that the policy lapsed due to non-payment. Mr. Meade died more than one year after the policy lapsed due to non-payment and Mrs. Meade seeks the proceeds of the policy.

The policy required that notice of lapse be sent to the person whose life is insured or the assignee of the policy. Mrs. Meade was neither, nor was she an irrevocable beneficiary. There was no requirement in the policy that she be provided with notification of the lapse of the policy.

Mrs. Meade argues that there are material issues of fact in dispute which preclude summary judgment.

She alleges that the depositions of Zoila Rivera and Pattie McWilliams, employees of USAA Life, indicate that the internal procedures of USAA Life concerning ex-spouses required that the company provide notification of lapse in circumstances such as those in the present case.

Nothing in the policy itself required that USAA Life provide notification to Mrs. Meade of the lapse of the policy due to non-payment. [*3] Further, prior to the death of her ex-husband, she was unaware of any internal procedure of USAA Life concerning notification of ex-spouses. Plaintiff quotes various provisions in internal procedural documents to suggest that the company violated its own internal policy in the case of Mrs. Meade. When read as a whole, USAA Life acted in a manner consistent with its procedures.

Plaintiff argues that the grace period provided in LSA-R.S. 22:170(a)(1) should be added to the nonforfeiture period provided in LSA-R.S. 22:177 so that John Meade's death on June 6, 1995 would be within the period of coverage, even if the coverage extended for one year from the date it lapsed, which was May 14, 1994. There is no support in the statutes themselves or in any jurisprudence interpreting these two Louisiana statutes which would support such an interpretation.

Louisiana Revised Statute 22:170(a)(1) requires that all life insurance policies delivered or issued for delivery in this state contain a grace period "either of thirty days or, at the option of the insurer, of one month within which the payment of any premium after the first may be made, during which period of grace the policy shall continue [*4] in full force", but the premiums may be deducted from the amount payable under the policy. There is no material factual dispute that the policy lapsed on May 14, 1994 for non-payment of premiums.

Plaintiff seeks to tack this grace period, which is inapplicable because the premiums were not paid within 30 days of the date of lapse, to the non-forfeiture period provided for in LSA-R.S. 22:177. Section 177 provides in pertinent part that "no life insurer shall within one year after default in payment of any premium, installment, loan or interest, declare forfeited or lapsed any policy issue or renewed" unless a written or printed notice is mailed "to the person whose life is insured or the assignee of the policy of the notice of the assignment has been given to the insurer." (Emphasis added). This statute states unambiguously that the non-forfeiture period is one year from the date the payment of premiums went into default, which in the present circumstances was May 14, 1994, and occurs only if notice is not provided to the insured or his assignee within time limits specified therein. There is no factual dispute

that notice was sent to the insured, John Meade. He did not assign [*5] the policy to plaintiff Jean A.M. Meade and therefore she was not entitled to notice under this statute.

Unfortunately, under the terms of an order issued by the court handling the divorce and property issues between them arising out of their marriage, John Meade was obligated to assign one of his life insurance policies to plaintiff Jean Meade until he obtained mortgage insurance. This order was entered prior to the time the USAA Life policy was purchased. John Meade failed to assign that policy to Jean Meade. She attempted to obtain information about the policy, and after John Meade gave permission to USAA Life, she was entitled to receive information upon request from USAA Life about the status of the policy. She did not inquire by telephone or in writing on or after May 14, 1994, and thus did not know that the policy lapsed until after John Meade's death. While she may have been proceeding under her own misunderstanding that she was to receive a forfeiture notice, there is no basis upon which to place liability on the defendant insurance company, as it followed all applicable statutory, jurisprudential, and contractual requirements.

The Court has reviewed the record extensively, [*6] including the depositions of employees of USAA Life and the exhibit offered by plaintiff as a copy of

the internal procedures to be followed by USAA Life employees in divorce situations. The Court does not find that these internal procedures were violated, on the basis of the evidentiary record on motion for summary judgment, and indeed does not find a dispute as to any material fact in this regard. However, such a violation of internal procedures would not, as a matter of law, entitle plaintiff to relief unless Louisiana law, either statutory or jurisprudential, affords such a basis for recovery. The record and the law does not support a finding in plaintiff's favor and further, reveals that there are no material issues of fact in dispute, as the Court originally concluded. Plaintiff has not shown that she is entitled to reconsideration as the defendant has no liability under Louisiana law, as reflected in the insurance statutes, jurisprudence, or in any contractual provision contained in the policy.

Accordingly, for the above and foregoing reasons, and the reasons expressed in the Court's initial Order and Reasons,

IT IS ORDERED that the motion of plaintiff for reconsideration [*7] be and is hereby DENIED.

New Orleans, Louisiana, this 17 day of April, 1997.

MARCEL LIVAUDAIS, JR.
United States District Judge

USAA LIFE INSURANCE COMPANY

JOHN ARTHUR MEADE
ILA SOUTH ROADWAY
NEW ORLEANS LA 70124-1142

THIS POLICY WILL LAPSE 06-14-94. TO AVOID THIS LAPSE, PAYMENT MUST BE POSTMARKED BY 06-14-94. SEE REVERSE FOR REINSTATEMENT OFFER. PLEASE DISREGARD IF PREMIUM HAS BEEN PAID.

EXHIBIT
B-1

BEST AVAILABLE COPY

LSA R.S. 22:170, Life insurance policies; standard provisions

A. No policy of life insurance, except as stated in Subsection C, shall be delivered or issued for delivery in this state unless it contains in substance the following provision or provisions which, in the opinion of the commissioner of insurance, are more favorable to the policyholder:

(1) A provision that the insured is entitled to a grace period either of thirty days or, at the option of the insurer, of one month within which the payment of any premium after the first may be made, during which period of grace the policy shall continue in full force, but if a claim arises under the policy during such period of grace before the overdue premiums or the deferred premiums of the current policy year, if any, are paid, the amount of such premiums, together with interest, not in excess of six per cent per annum, on any overdue premium, may be deducted from any amount payable under the policy in settlement.

La.R.S. 22:177:

No life insurer shall within one year after default in payment of any premium, installment, loan or interest, declare forfeited or lapsed any policy issued or renewed, and not issued upon the payment of monthly or weekly premiums or for a term of one year or less, for nonpayment when due of any

premium, installment, loan or interest, or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating:

(1) The amount of such premium, installment, loan or interest, or portion thereof due on such policy; and

(2) The place where it shall be paid and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured or the assignee of the policy if notice of the assignment has been given to the insurer, at the last known post office address of such insured or assignee, postage prepaid by the insurer or any person appointed by it to collect such payment, at least fifteen and not more than forty-five days prior to the date when the same is payable.

No policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Any payment demanded by such notice and made within the time limit shall be taken to be full compliance with the requirements of the policy in respect to the time of such payment.

The affidavit of any officer, clerk or agent of the insurer or of anyone authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the insurer issuing such

policy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within two years from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued. This Section shall not apply to group insurance policies.